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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 618.

NEW SOUTHERN OHIO GAS COMPANY AND CHARLES EBERSBACH,

Petitioners,

vs.

SYLVIA ROUSH, WILBUR ROUSH, EBER ROUSH, SADIE ROUSH GRINDLEY, GEORGE ROUSH, FLORA ROUSH, FLOSSIE ROUSH AND LILLIAN ROUSH DURST,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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We sincerely contend that the petition of the petitioners for writ of certiorari should be dismissed.

There is no federal question of substance in this case, nor does the decision of the Sixth Circuit Court of Appeals conflict with other Circuit Court of Appeals' decisions, as it would appear from the most distorted state-

ments by petitioners. A true perspective of the case may be obtained from the opinion of the referee which we reprint herewith. (Appendix I.)

JURISDICTION.

Under this heading, what they label as a question of jurisdiction for this court is only a portion of the opinion of the Court of Appeals. Upon this portion of the opinion they conclude that the opinion promulgates a rule of law in conflict with a rule of law as announced by other Circuit Courts of Appeals. For the benefit of the court we print herewith the opinion of the Circuit Court of Appeals. (Appendix II.)

QUESTIONS PRESENTED.

Under this heading counsel have attempted to elaborate on the former heading by setting forth four statements which, in substance, contain their reasons why the Circuit Court's opinion is in conflict with opinions of the Circuit Courts for the second, third, fifth, seventh, eighth and ninth circuits.

STATEMENT.

Under this heading the appellants give a very brief statement of a portion of the history of the case. We herewith submit the entire history.

Old Southern Ohio Gas Company went into bankruptcy on the twenty-sixth day of November, 1929 (R., 18). Said company operated in Meigs county, Ohio, and owned title to four operating gas and oil leases together with

the personal property required and necessary to operate the same (R., 63), and numerous other leases. Appraisers, duly appointed and familiar with the property of the bankrupt company, examined the same and listed in the appraisement as all of the bankrupt's property the four operating leases and the chattels and cash, **and did not include the Roush lease** (R., 59). Chalmers M. Parker, the attorney of record in this case for petitioners, was the attorney for the trustees in bankruptcy (R., 65 and 70). He knew what property had been appraised and what property was included in the assets of the bankrupt company.

On September 13, 1931, a petition for private sale was filed by the trustees of the bankrupt company, by Chalmers M. Parker, asking for an order of court permitting them to sell the entire assets of the bankrupt (R., 63). **The Roush lease was not mentioned in this petition.** On September 30, 1931, an order was made, pursuant to said petition, authorizing the private sale of the property as listed in the petition (R., 65).

Lillian Roush Durst, a Roush heir, on January 2, 1932, wrote a letter to the Hon. George B. Bitzer, referee in bankruptcy, in Chillicothe, O., inquiring as to what rights, if any, was claimed by the bankrupt company in and to the Roush lease (R., 72). This letter was turned over to the attorney for the trustees, Chalmers M. Parker, for reply (R., 72). On January 7, 1932, said attorney wrote to Lillian Roush Durst and advised her that the Roush lease was one of the many leases forfeited by the company long before it was adjudicated bankrupt (R., 69).

On November 4, 1932, an order was made confirming private sale (R., 5), the legality of which should be seriously questioned since it was a distribution and not a sale. Report of distribution was made on June 26, 1936 (R., 7). This was three days after the referee had given what purports to be a notice to the creditors (R., 6).

The bankrupt estate was kept open until June, 1936 (R., 8), so that more than four years expired after the attention of the referee and the trustees' attorney was called to the Roush lease, and no claim was made during that time and no action was ever taken to try and bring the Roush lease into the estate as an asset.

On the eighteenth day of February, 1941, the New Southern Ohio Gas Company filed suit invoking the jurisdiction of the state court of Meigs county, Ohio, claiming title to the Roush lease (R., 68). The Roush heirs filed an answer and cross-petition in said cause questioning the right of the New Southern Ohio Gas Company to claim title, and in said suit the Roush heirs asked for the quieting of title to their property (R., 16), which suit is still pending.

On March 19, 1941, New Southern Ohio Gas Company filed an application to re-open the estate (R., 1). It was stated therein that "subsequent to the offer for sale of the four gas and oil leases listed by the bankrupt * * * it was discovered that the bankrupt was the owner of a fifth lease, known as the Roush lease, which it had failed to list among its assets and which was covered by the same first mortgage."

The Roush lease was never covered by the first mortgage. Quoting from the record (R., 43), "Likewise, it"

(Roush lease) "has been stipulated that it was not mentioned in the mortgage held by the secured creditors, and in fact the lease was dated after the mortgage."

The first mortgage under which the petitioners claim was dated February 4, 1925, while the Roush lease was dated April 21, 1925 (R., 69).

Thereafter, the Roush heirs were made parties in the bankruptcy matter and filed their motion (R., 9) asking the court to set aside its order to reopen said estate for the chief reasons, that there were no newly discovered assets, and that the New Southern Ohio Gas Company acquired only the assets of the bankrupt company on distribution as were listed in the petition for private sale.

The court overruled this motion (R., 31). Thereupon, June 13, 1941, New Southern Ohio Gas Company and Charles Ebersbach, an alleged creditor, filed an application (R., 10) in which it was asked that "the trustees be authorized and directed to execute to New Southern Ohio Gas Company a formal assignment of all the right, title and interest of Southern Ohio Gas Company in and to the Roush lease described in this application." To this application the Roush heirs filed their answer.

This application was formally set for hearing before the Hon. G. H. Butt, referee, and was heard upon the application, answer of Wm. D. Roush heirs, affidavits, and stipulations (R., 32). Mr. Parker stated before Hon. G. H. Butt, referee, that his clients were relying on an oral order made by Judge Hough, district judge. This oral order was never made a part of the record. The referee, under date of December 31, 1941, by order denied

said application (R., 32). January 6, 1942, a petition for review was filed (R., 34). December 14, 1942, said petition in review was found to be not well taken and same was dismissed (R., 47).

Thereupon, the petitioners filed an appeal in the Circuit Court of Appeals where the case was heard on the same evidence and record as was made in the bankruptcy court, and which is now designated as transcript of the record in this cause. Chalmers M. Parker told the Circuit Court of Appeals his clients were relying on the oral order of Judge Hough for title to the Roush lease.

ARGUMENT.

I.

Jurisdiction.

There is no grave importance to the questions raised by the petitioners. Their chief complaint is that the Circuit Court of Appeals treated the referee's conclusions as "referee's finding of fact that the Roush lease had not been conveyed to the appellant company." Petitioners complain that the Circuit Court of Appeals deprived them of full review on the merits in affirming the District Court.

The Sixth Circuit Court held,

> "And it appearing that the record shows no evidence of any order of the bankruptcy court conveying to the appellant company any right, title or interest in the Roush lease, hence the finding of fact is clearly correct."

The petitioners would have this court review the record since they complain the Sixth Circuit Court deprived them of such a review. The Circuit Court very pointedly in its opinion said that a complete review of the record, facts and law had been made by that court.

It has long been recognized by this court a writ of certiorari will not be granted to review evidence.

United States v. Johnston, 268 U. S., 220, at page 227 of the opinion by Mr. Justice Holmes:

> "We do not grant a certiorari to review evidence and discuss specific facts."

General Pictures Co. v. Electric Co., 304 U. S., 175, the court says, at page 178:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. N. C. Public Service Co., 263 U. S., 508; United States v. Johnston, 268 U. S., 220, 227. Moreover, the decisions on that point rests on concurrent findings. They are not to be disturbed unless plainly without support."

State Farm Insurance Co. v. Coughran, 303 U. S., 485, at page 487, the court says:

> "Under applicable statutes and repeated rulings here, the matter open for consideration upon the appeal was whether the findings of the trial court supported its judgment. To review the evidence was beyond the competency of the court."

II.

Does the Opinion as Pronounced by the Sixth Circuit Promulgate a Rule Different From That of the Second, Third, Fifth, Seventh, Eighth and Ninth Circuits?

2 Cir. **Frederick v. Baxter Arms Corp.**, 107 F. (2d), 736, quoting from the syllabi:

> "A bankruptcy trustee's appeal * * * must fail, unless trial court's finding * * * is clearly erroneous. Rule of Civil Procedure for District Courts, Rule 53(e), 28 U. S. C. A., following Section 723c."
>
> Also **Corbett v. Halliwell**, 123 F. (2d), 331.

Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir., 119 F. (2d), 704, at page 705, the court says:

> "The appellee reminds us that we are not at liberty to disturb findings of fact made by the trial court unless they are unsupported by evidence or are otherwise clearly erroneous. Rule 52(a), 28 U. S. C. A., following Section 723c. * * * So long, therefore, as a finding of fact is supported by evidence and is not clearly erroneous, it is to be accepted on appeal as verity."
>
> Also same Circuit, **Anthony P. Miller, Inc., v. Needham, et al.**, 122 F. (2d), 710.

The same rule has been promulgated by the various circuits in the following decisions:

Fifth Circuit—

Case of **Collier v. Union Central Life Ins. Co.**, 100 F. (2d), 411, and

Case of **Butex Gas Co. v. Southern Steel Co.**, 123 F. (2d), 954.

Seventh Circuit—

Case of **Bradley, et al., v. Smith**, 114 F. (2d), 161.

Eighth Circuit—

United Drug Co. v. Obear Nester Glass Co., 111 F. (2d), 997, and
McIntosh v. Wiggins, 123 F. (2d), 316.

Ninth Circuit—

Occidental Life Insurance Co. v. Thomas, 107 F. (2d), 876, and
U. S. v. Foster, 123 F. (2d), 32.

We believe that the Circuit Court of Appeals in the present case is in agreement with these other Circuits above enumerated, and about which the petitioners complain. We believe that "clearly erroneous" is just another way of saying "plain mistake," as was used by the Circuit Court in the present case.

We, therefore, do not see where the decision of the Sixth Circuit has promulgated a rule different than the rule indicated in the other Circuits.

III.

Did the Circuit Court of Appeals Properly Review the Record?

It most assuredly did. Mr. Parker, attorney for the petitioners, in the hearing before the referee and again in his oral argument before the Sixth Circuit Court, stated that his clients were relying on an oral order of Judge Hough. Nowhere in the record is there any such order, nor is there any reference made to such in the transcript of record.

Nowhere in the record in this case is the Roush lease mentioned prior to the closing of the bankrupt estate under the order of June, 1936, upon which the petitioners rely. The Roush lease was not listed as an asset, was not referred to in the petition to sell, order or sale, or order confirming distribution. Judge Martin of the Sixth Circuit inquired of Mr. Parker if there might not have been more bidders and possibly a better bid had the Roush lease been offered for sale as an asset along with the other leases.

Since there is no evidence of any type or character in reference to the Roush lease in the record in the bankruptcy proceedings prior to the order under which petitioners claim, we feel the referee, the District Court and the Circuit Court of Appeals have been correct in holding that on the record made all orders have been correct and have rendered substantial justice to all parties concerned

IV.

Did the Order of June 26, 1936 (R., 8) Sell or "Distribute" the Roush Lease?

The petitioners on page 21 of their brief say, "The intent and legal effect of the order of the District Court entered June 26, 1936 (R., 8), was to sell or 'distribute' to petitioner the remaining assets of the bankrupt, including the bankrupt's interest in a certain oil and gas lease known as the Roush lease."

We believe that no one seriously contends a sale of the Roush lease was ever had. We do not know of any provisions of the Bankruptcy Act or General Orders in Bankruptcy where a distribution can be made of property from the bankrupt to a small part of its creditors without formally conducting a sale.

In this case, the New Southern Ohio Gas Company, who claims to be the purchaser of all the assets of the bankrupt company, had the assets distributed to it because the stockholders of the new company held a portion of the first mortgage bonds of the old company. As such distributee it also received certain chattel property not covered by the first mortgage. The Roush lease was not in existence at the time the mortgage was executed.

We direct the court's attention to the order of distribution (R., 63) for reference, for this court to determine what the distributee received. No reference is made to the Roush lease. The Roush lease was not before the

court and no order was ever made affecting it. If the Roush lease was an asset it should have been brought into the bankruptcy court and sold as an additional asset since the mortgage under which petitioners claim gave them no right to the lease. It was an asset for the benefit of all creditors.

V.

Petitioners Make Claim That the Roush Heirs Are Not Proper Parties.

The petitioners are claiming the property of the Roush heirs by reason of bankruptcy proceedings. The petitioners, under date of June 13, 1941, after the estate had been reopened (R., 10), petitioned the bankruptcy court for an order asking that it be given a formal assignment of an interest to lands of the Roush heirs. The Roush heirs appeared in court and in formal hearing resisted this application. It was upon the evidence adduced at this hearing, which is of record in this case, that the issue of the existence and ownership of the Roush lease was determined.

Section 23 of the **Bankruptcy Act**, U. S. Code, Title II, Chapter 4, Section 46, provides:

> "The United District Courts shall have jurisdiction of all controversies at law and in equity, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees."

Collier on Bankruptcy, 14th Edition, Vol. 2, page 449, Section 23.04.

> "In speaking of controversies in relation to jurisdiction, the intent here is to consider disputes or controversies arising in the course of bankruptcy proceedings between claimants and the trustee or receiver regarding property claimed to be part of the estate."

Under the rule and the above statement, there is no question but what the Roush heirs, in resisting the claim asserted to their property, are adverse claimants and proper and necessary parties.

Respectfully submitted,

ARTHUR L. ROWE,

Attorney for Respondents.

McGHEE, ROWE & EVANS,

Of Counsel.

APPENDIX I.

Memorandum.

By a recent order of this Honorable Court, the above named cause which had been theretofore closed, was reopened and referred to the undersigned referee for further proceedings. Subsequently thereto, a trustee was duly elected at a regularly noticed hearing, and he having qualified, took charge of the further administration of the estate.

Thereafter, on June 13, 1941, an application was filed in said proceeding by New Southern Ohio Gas Company, "a corporation composed of creditors having claims secured by first mortgage, and Charles Ebersbach, a creditor" which said application concluded with the following prayer:

> "Wherefore, your petitioning creditors pray that the trustee be authorized and directed to execute to New Southern Ohio Gas Company a formal assignment of all the right, title and interest of Southern Ohio Gas Company in and to the Roush lease described in this application, the four leases listed by the bankrupt, known as the Cross, Cotterill, Camden and Krider Leases, and any and all other leases in which the bankrupt may have had some right, title or interest; that the trustee be also authorized and directed to execute to New Southern Ohio Gas Company a bill of sale transferring all of the right, title and interest of Southern Ohio Gas Company, bankrupt, in and to any and all personal property of the bankrupt of whatsoever nature and wheresoever situated; and that said trustee be authorized and directed to take such steps in the Cause No. 9929, pending in the Common Pleas Court of Meigs county,

Ohio, as may be for the best interests of the creditors."

To this application is attached an exhibit, in the form of an answer and cross-petition filed by the defendant Roush Heirs, in Cause No. 9929 pending in Common Pleas Court of Meigs county, Ohio. (A copy of said application and exhibit is attached hereto as Exhibit R-1).

Upon application of the Roush Heirs, they were made parties to this proceeding before the referee and on November 6, 1941, filed their answer to the aforesaid application of New Southern Ohio Gas Company and Charles Ebersbach herein.

From an examination of the pleadings aforesaid, it is apparent that a dispute exists as to whether or not the New Southern Ohio Gas Company has a leasehold interest in real estate belonging to the Roush Heirs. This dispute became a lawsuit in Cause No. 9929 brought by the applicant against the Roush Heirs. During the pendency of that suit, this case was reopened and the applicants now seek a conveyance from this trustee of the Roush lease and all other property of the bankrupt, including four other leases.

A detailed consideration of the application filed in this court and of the answer thereto, can be of little or no benefit. It is the contention of the applicants that they are entitled to a conveyance from this court of all property of the bankrupt, including four leases and the Roush lease as a fifth lease. This the Roush Heirs oppose and contend that neither the bankrupt estate nor the applicants have any interest in their real estate.

Upon due notice, the application and the answer thereto came on to be heard before the referee at a legally noticed hearing at which both parties were represented. A record was taken of the proceedings and is submitted herewith.

It will be noted from an examination of the record that very little evidence was offered. Upon motion, the files of the case were admitted, with the understanding that the pertinent parts thereof would be pointed out. It developed that these parts of the record were limited to the orders by which title to certain property was purportedly passed from the Trustee in Bankruptcy to the corporate applicant herein. As shown by the first part of the record, certain matters were stipulated and these are of course considered as facts in the case. Affidavits as shown by the record were offered and admitted in evidence, but the affidavits offered do not serve in any way to support the contention of the applicants herein.

It may be truthfully and accurately said that there is but one question for decision and that is:

> "Is the New Southern Ohio Gas Company entitled to a conveyance from the trustee of this court, of the Roush lease and other property heretofore not specifically mentioned in the orders and papers authorizing the sale of certain assets of the bankrupt?"

There is no disposition evidenced by any of the parties hereto to deny that the applicants are entitled to a conveyance of the property specifically listed in such orders and papers, including the four leases, but excluding the Roush lease. This situation then resolves itself into a question of whether or not the New Southern Ohio Gas

Company is entitled to a conveyance of the Roush lease and until this question can be answered in the affirmative, there is no need to consider the rights of the Roush Heirs as compared with the rights of the corporate applicant. It is only necessary to consider the rights of the corporate applicant as compared with those of the estate and it is to this phase of the question that the referee has limited himself in his consideration of the matters presented.

In the opinion of the referee, any title that the corporate applicant may have to the Roush lease, must be founded upon a conveyance made or authorized through this court. It is therefore necessary to examine the various documents and papers by means of which transfer of any title which the bankrupt may have had to the Roush lease, may have been conveyed by authority of this court, or which may have authorized a conveyance without amounting to a conveyance.

It may be stated that the Roush lease was not scheduled by the bankrupt and that it was not mentioned in any part of the record during the first administration of this estate. Likewise, it has been stipulated that it was not mentioned in the mortgage held by the secured creditors, and in fact the lease was dated after the mortgage.

In so far as the file shows in this case, there was but one proceeding initiated aiming toward the transfer of title to the property of the bankrupt. This was begun on September 14, 1931, by the filing of a petition for private sale which was filed on behalf of the three trustees by Chalmers Parker, their attorney. The property covered by this petition is specifically set forth therein as being comprised of the Cross lease, Cotterill lease, Camden

lease, Kreider lease and "on the above property is located 4 powers to pump the property which includes engines, power houses, shackle lines, tanks, pipe and tubing." No other property of any kind is referred to in said petition, a copy of which is attached hereto as "Exhibit R-2." The prayer of the petition was for an order to sell "free and clear," at private sale.

The next material paper appearing in the file is an order to sell, which again recited the exact descriptions of the four leases as set forth in the petition to sell and again specifically included the "4 powers to pump the property which includes engines, power houses, shackle lines, tanks, pipe and tubing." A copy of said order is attached hereto as "Exhibit R-3" and it clearly shows upon its face that it is an order to sell at private sale as it purports to be, and that it specifically covers only the property covered in the petition. There is no general clause which could be construed as covering any other property. This order was signed by Referee Bitzer and filed on September 30, 1931.

The next step in the transaction was the report of private sale and request for instructions filed November 4, 1932. A copy of said report being attached hereto as "Exhibit R-4." The report shows that the property was offered at private sale and the creditors elected to sell the property to a corporation to be formed of creditors. The prayer is for the confirmation of said sale and covered only "four (4) leases, together with the buildings, and equipment located thereon."

This private sale was confirmed by an order confirming private sale, which was filed November 4, 1932, and which

was issued by Judge Hough. The language of the order with reference to the property sold being: "four (4) leases together with buildings and equipment located thereon." A copy of said order is marked Exhibit R-5 and attached hereto.

The next order which sheds light on the situation was that confirming distribution of the assets of the bankrupt pursuant to former order. This was preceded by a report of distribution of the assets of the bankrupt pursuant to former order. It merely recites that "distribution of the assets of the bankrupt has been made pursuant to the former order of the court herein." A copy of said report is attached hereto as "Exhibit R-6." An examination of the report will show that it has been inaptly designated for it does not attempt to show what property has been distributed except by reference to prior orders which have been hereinbefore referred to. The order following such report (a copy of which is attached hereto as "Exhibit R-7") is in the same general terms as the report. It can in no way be taken to enlarge the order of sale.

It is the conclusion of the referee that under the circumstances, the New Southern Ohio Gas Company took no interest whatever in the Roush lease and that if the bankrupt estate has, or had any interest therein, which is still existing, that interest is still, in so far as these petitioners are concerned, in the hands of the Trustee in Bankruptcy of the former corporation. Having gone through definite proceedings to acquire certain specific property of the bankrupt, certainly the petitioning corporation cannot thereby claim to have acquired other property of the bankrupt which was given absolutely no

mention in the proceedings to sell and the proceedings of sale. The doctrine and contention advanced by the petitioning corporation is to the referee, strange and without foundation in law.

The prayer of the petition has therefore been granted only in so far as it sought a conveyance of the property listed in the proceedings for sale and of sale; in so far as the petition seeks a conveyance of any possible interest in the Roush lease, it has been denied by the referee.

G. H. Butt.

APPENDIX II.

Judgment.

(Entered October 21, 1943.)

This case came on to be heard upon the record and briefs and argument of counsel.

And it appearing that the referee's finding of fact that the Roush lease had not been conveyed to the appellant company was confirmed by the District Court and should not be disturbed for anything less than a demonstration of plain mistake [Fruehauf Trailer Co. v. Bridge, 84 Fed. (2d), 660, 663 (C. C. A. 6); Bagley v. Rowley, 127 Fed. (2d), 139, 140 (C. C. A. 6)].

And it appearing that the record presents no evidence of any order of the bankruptcy court conveying to the appellant company any right, title or interest in the Roush lease, and hence the finding of fact is clearly correct:

It is ordered, adjudged and decreed that the order of the District Court dismissing the petition to review the order of the referee be, and it hereby is, affirmed.